

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RODNEY J. MARTINEZ**

Claimant

VS.

**RUBBERMAID SPECIALITY PRODUCTS, INC.**

Respondent

Self-Insured

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Docket No. 1,003,012

**ORDER**

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on May 9, 2002.

**ISSUES**

(1) Did the Administrative Law Judge exceed her jurisdiction when she refused claimant's request to designate Dr. Pedro Murati as the authorized treating physician and instead ordered that the physician claimant selected from the list of three physicians respondent had previously provided would be the authorized physician?

(2) Did the Administrative Law Judge's Order constitute an advisory opinion and, if so, did she thereby exceed her jurisdiction?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board (Board) finds the Administrative Law Judge (ALJ) did not exceed her jurisdiction and the Board is therefore not authorized to review the ALJ's preliminary hearing Order at this stage of the proceedings. Accordingly, the Board finds that this appeal from the ALJ's Order should be dismissed.<sup>1</sup>

---

<sup>1</sup>This appeal presents the same issues previously addressed by the Board in *Wright v. Rubbermaid Specialty Products, Inc.*, WCAB Docket No. 1,000,695 (May 2002) and, coincidentally, involves the same attorneys for both the claimant and the respondent.

No testimony was offered at the Preliminary Hearing, only statements of counsel. Respondent's Brief makes the following factual assertions:

1. A preliminary hearing was conducted on May 9, 2002.
2. Prior to the hearing, claimant attorney indicated that the benefit being sought by claimant was change of physician.
3. Respondent attorney notified claimant attorney that, rather than litigating the issue of whether the treatment provided was satisfactory, the respondent was willing to voluntarily provide a list of three physician names pursuant to K.S.A. § 44-510h(b)(1). Respondent attorney also provided claimant attorney with a list of three physician names at this time.
4. Claimant refused to select a physician from the list provided, but insisted that a preliminary hearing be conducted. A hearing was held. At the hearing, claimant demanded that Dr. Murati be the authorized treating physician. [Prior to the date of the preliminary hearing, claimant had not made the request that Dr. Murati be the authorized treating physician. In fact, claimant's March 28, 2002 notice of intent letter, even though it requests every other conceivable benefit, does not mention Dr. Murati. (Prel. Hrg., Respondent. Ex.1.)] In the alternative, the claimant demanded that the court order the respondent to provide the claimant a list of three physician names and also order the respondent to authorize the physician that claimant selected from the list of three names as the authorized treating physician.
5. Respondent objected to the administrative law judge issuing an order addressing the change of physician issue since the respondent had already provided that benefit voluntarily and there was no dispute that respondent had already provided the claimant with a list of physician names and had agreed that the physician selected would become the new authorized treating physician.
6. Despite the fact that claimant's request for change of physician had been voluntarily complied with by the

respondent prior to any hearing being convened, the administrative law judge nevertheless issued an order ordering that the physician selected by the claimant from the list would be the authorized treating physician.<sup>2</sup>

In his brief, claimant disagrees with some of respondent's factual assertions and describes the chronology as follows:

1. Claimant counsel submitted a letter to respondent by certified mail on March 23, 2002, requesting a change of treating physician.
2. Respondent did not respond to Claimant counsel's request within seven (7) days.
3. Claimant counsel submitted a letter to the Director on April 7, 2002, requesting that the matter be docketed for hearing.
4. The Director's office submitted a Notice of Hearing to Claimant counsel, Administrative Law Judge and respondent on April 10, 2002.
5. Respondent continued to refuse, neglect or ignore Claimant's request.
6. Claimant counsel then sent notice, on April 16, 2002, of a preliminary hearing scheduled for May 9, 2002. Respondent was sent notice at that time.
7. Respondent was aware, prior to the preliminary hearing, that Claimant was requesting a change of physician as well as other demands in his notice of intent.
8. On the morning of May 9, 2002, respondent and Claimant counsel met prior to the scheduled hearing.
9. Claimant counsel requested that Dr. Murati be authorized as the treating physician.
10. Shortly before the scheduled hearing, Claimant counsel agreed to choose a physician from respondent's list of

---

<sup>2</sup>Respondent's Brief, pp. 1-3 (filed June 3, 2002).

three (3), provided that, and only that, the list be by agreed order.

11. Respondent refused to enter into an agreed order.

12. The scheduled hearing ensued.<sup>3</sup>

Claimant asked the ALJ for a change of treating physician, the continuation of temporary total disability compensation and the payment of all authorized and related medical treatment expenses incurred to date. Claimant requested for the ALJ's Order to specifically name Dr. Murati as the authorized treating physician. Judge Barnes denied this request.

Respondent argues that in holding a preliminary hearing the ALJ exceeded her jurisdiction because there was no controversy. Respondent had already agreed to a change of treating physician and provided claimant with a list of three physicians.

As above indicated, the Board has concluded the respondent's appeal does not raise a jurisdictional issue subject to review. Respondent cites the decision by the Board in Beck v. Beech Aircraft Co., WCAB Docket No. 216, 221 (May 2001). In that decision, it was determined that an order changing authorized physician after the respondent had already provided a list of three physicians and agreed to authorize the specific physician claimant requested, left no justiciable controversy for the ALJ to decide. But Beck involved an application for post-award medical benefits pursuant to K.S.A. 44-510k and attorney fees under K.S.A. 44-536(g). This case comes before the Board on an appeal from a preliminary hearing. Therefore, the Board's jurisdiction to review the Order is limited.<sup>4</sup> Here claimant was seeking preliminary hearing benefits, primarily, a change of physician under K.S.A. 44-510h(b)(1). That statute provides in pertinent part as follows:

If the director finds, upon application of an injured employee, that the services of the health provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, **the director may authorize the appointment of some other health care provider.** In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services

---

<sup>3</sup>Claimant's Brief, pp. 1-2 (filed July 5, 2002).

<sup>4</sup>See K.S.A. 44-534a and K.S.A. 44-551.

from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider. (*Emphasis added.*)

By proceeding to hearing, as opposed to agreeing to a physician being authorized by respondent voluntarily, claimant obtained the protection afforded by an ALJ's Order. In addition, the matter of claimant's request for Dr. Murati to be designated as the authorized physician was addressed in the Order. This had been discussed but no agreement was reached before the preliminary hearing. Thus, there was a justiciable controversy. The ALJ had jurisdiction to decide the question.

**WHEREFORE**, the Appeals Board finds and concludes that the appeal by the respondent should be and is hereby dismissed as the Administrative Law Judge did not exceed her jurisdiction and the Appeals Board is otherwise without jurisdiction to consider the issues of medical treatment and temporary total disability compensation on an appeal from a preliminary hearing order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2002.

---

BOARD MEMBER

c: Terry J. Torline, Attorney for Respondent  
Steven R. Wilson, Attorney for Claimant  
Nelsonna Potts Barnes, Administrative Law Judge  
Director, Kansas Division of Workers Compensation